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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES CHARLES WALLACE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION PERMITS A POLICE OFFICER TO CLAIM THAT A PRIVATE SHED WAS ABANDONED FOR PURPOSES OF CONDUCTING A WARRANTLESS SEARCH WHERE THE PETITIONER HAD AN EXISTING LEASE ON THE SHED, WHERE THE SHED WAS LOCKED, WHERE PETITIONER HAD LEFT THE SHED MINUTES BEFORE THE SEARCH, AND WHERE PETITIONER WAS PRESENT AND IN CUSTODY AT THE TIME OF THE SEARCH, AND DID NOT CONSENT TO THE SEARCH.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 22, 1989. No Motion for Rehearing was filed.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished, and appears in the Appendix, Exhibit A.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction as to Petitioner and his Co-Defendant by a written, unpublished opinion dated June 22, 1989. No Motion for Rehearing was filed with the Court of Appeals. An order granting a thirty (30) day extension of time for filing this petition was signed by Justice Sandra Day O'Conner on August 14, 1989. This petition was filed within ninety (90) days of June 22, 1989.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution, Amendment 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Section 841(a)(1):

> (a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

United States Code, Section 846:

> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner, JAMES CHARLES WALLACE was indicted, tried, and convicted in Cause No. CR-87-0081-EDP in the United States District Court for the Eastern District of California. Petitioner was sentenced to serve concurrent ten-year terms of imprisonment on Counts Two and Three, the manufacture of PCP and possession of PCC. Petitioner was placed on a five-year term of probation on Count One, conspiracy to manufacture PCP, to commence upon his release from confinement.

The federal question presented for review herein was raised before the United States Court of Appeals for the Ninth Circuit by Petitioner in Cause No. 88-1330, and by Defendant Kelvin Kim Williams in Cause No. 88-1318, both appeals having been ruled upon in the joint opinion heretofore referred to. Appendix, Exhibit A.

On or about July 17, 1987, Petitioner and Williams went to California on vacation. On the evening of July 19, 1987, Petitioner and Williams travelled to Co-Defendant Upson's house at 11340 Arapaho Way, a few miles outside of Burson, Calaveras County, California. At approximately 10:00 p.m. on the same

day, Sergeant William Nuttal and Deputy Jack Chew of the Calaveras County Sheriff's Office responded to a complaint of suspicious chemical odors in the vicinity of 11340 Arapaho Way. At that location, the officers observed a mobile home, a large wooden shed located approximately twenty-five feet from the mobile home, and a motor home situated approximately thirty feet from both the shed and the mobile home. Deputy Chew testified that he left the police vehicle, and walked toward the shed. When he came within five hundred feet of the shed, he saw an interior light of a vehicle go on, then off, he heard the vehicle being started, and observed it being driven away at a high rate of speed. The officers gave chase and found the vehicle overturned approximately one-half mile down a steep, bumpy, gravel road. The vehicle was off the side of the road. Next to this vehicle, the officers encountered Petitioner, Williams, and a passer-by who had stopped to help. As Deputy Chew approached, he smelled the odor of ether coming from Petitioner and Williams. Petitioner and Williams were placed in a patrol car and taken back to 11340 Arapaho Way. At that location, the officers encountered Upson, who stated that the Petitioner and Williams had rented the shed from him. Upson consented to the search, and gave the officers a key to the padlock on the shed. The officers did not have a search warrant. Petitioner and Williams remained in the patrol car. Neither was asked to consent to the search, and neither gave such consent. Inside the shed, the officers observed an illegal drug manufacturing laboratory. The following day, July 20, 1987, government agents, pursuant to a search warrant, searched the entire area, including the shed. These agents found chemicals and

equipment, including fifty-five pounds of PCC. They also found three buckets of chemical sludge which were found to contain detectable amounts of PCP.

REASON FOR GRANTING THE WRIT

WHETHER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION PERMITS A POLICE OFFICER TO CLAIM THAT A PRIVATE SHED WAS ABANDONED FOR PURPOSES OF CONDUCTING A WARRANTLESS SEARCH WHERE THE PETITIONER HAD AN EXISTING LEASE ON THE SHED, WHERE THE SHED WAS LOCKED, WHERE PETITIONER HAD LEFT THE SHED MINUTES BEFORE THE SEARCH, AND WHERE PETITIONER WAS PRESENT AND IN CUSTODY AT THE TIME OF THE SEARCH, AND DID NOT CONSENT TO THE SEARCH.

EXPECTATION OF PRIVACY

A person may have a legitimate expectation of privacy in a place or object he does not own. *United States v. Reyes*, 595 F.2d 275, 278 (5th Cir. 1979). Moreover, a lessor cannot consent to a search of leased premises. *Stoner v. California*, 376 U.S. 483, 489-90, 84 S. Ct. 889, 893-94, 11 L.Ed.2d 856 (1964); *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L.Ed.2d 828 (1961).

In the present case, while the lessor had retained a key to the padlock that the police found on the shed, there is no evidence that the Petitioner-lessee had given the lessor the right to enter the shed. Therefore, no evidence exists that Petitioner had relinquished his right to privacy of the leased shed.

A lessee has standing to raise a legitimate expectation of privacy in the said leased premises; therefore, the Petitioner, in the instant case, had standing to contest the warrantless search.

ABANDONMENT

The trial court ruled that the Petitioner lacked standing to challenge the search because he had abandoned the shed that he had leased. The standard of review is whether the trial court has made a "clear error" in its finding of abandonment. *United States v. Nordling*, 804 F.2d 1466 (9th Cir. 1986); *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984), *cert. denied*, 469 U.S. 1035, 105 S. Ct. 509, 83 L.Ed.2d 399 (1984).

The test of abandonment is whether the alleged owner has retained a reasonable expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 59 S. Ct. 83, 99 L.Ed.2d 1035 (1978); *United States v. Haddad*, 558 F.2d 968 (9th Cir. 1977).

In the present case, the trial court concluded that the Petitioner intended to relinquish control of the shed based solely upon his departure from the property. The trial court made a clearly erroneous ruling because it did not properly take into account the totality of the circum-

stances, including "denial of ownership and physical relinquishment of the property." *Nordling, supra,* at 1469.

The Ninth Circuit, in affirming the trial court's judgment in the instant case, held that the reasoning of *United States v. Anderson,* 663 F.2d 934 (9th Cir. 1981), as cited in the Appellee's brief to the Ninth Circuit, was controlling. In *Anderson,* the defendant was detained at an airport by federal agents. Anderson disclaimed ownership of four pieces of luggage taken from the cargo area of the plane. The Ninth Circuit made no finding of abandonment and ordered the case remanded to the trial court to determine whether the defendant "demonstrated a reasonable expectation of privacy in the luggage . . ." *Id.* at 938. In that no finding of abandonment was made, *Anderson* does not have precedential authority for the case at bar.

The facts of the instant case are more akin to those in *United States v. Warner,* 843 F.2d 401 (9th Cir. 1988). In *Warner,* the defendant's motion to suppress was granted because a landlord who had a key to a garage leased by the defendant allowed a police officer to enter the garage without a search warrant. That court ruled that the "landlord . . . could not give effective consent for the search of Warner's property. *Id.,* at 403; *Chapman, supra.*

"The law of California recognizes that a tenant can abandon the premises to the landlord; abandonment turns on the intent of the lessee. As in the law of contracts, the parties to the transaction and third persons are entitled to rely on intention as it objectively appears, not on an intention that is subsequently disclosed after there has

been reliance or a change of position." *United States v. Sledge*, 650 F.2d 1075, 1078 (9th Cir. 1981). Here, the fact that Petitioner left in a hurry, simultaneously with the arrival of a police car was, in and of itself, not an indication of any *intent* to abandon. The Defendant testified that he did not know that a police vehicle was following him. When the Defendant returned to the shed that evening in the custody of the police, he did not participate in the decision to unlock and enter the shed. Only the lessor, who later was charged along with Petitioner in the same case, consented to the search.

This consent is similar to that in *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L.Ed.2d 856 (1964), in which police officers approached a hotel clerk and asked him if the defendant was living there and the clerk replied affirmatively. *Sledge*, *supra*, at 1077, fn. 3, *quoting Stoner*, *supra*, at 485, 84 S. Ct. at 891. The clerk gave permission to search the defendant's room. The police conducted a search without benefit of a warrant. While the police stated at trial that they believed that the clerk had had the authority to consent, (*Stoner*, *supra*, at 488, 84 S. Ct. at 892), the *Stoner* court held that the police in fact did not have a reasonable basis for believing that the hotel clerk had authority. Similarly, in the case at bar, the police did not have a reasonable basis for believing that the lessor had authority to consent to their entering the shed.

While part of the abandonment concept was based upon Petitioner's leaving the shed contemporaneously with the arrival of the police, those same police officers had the opportunity to and should have obtained more information, so as to base their decision on the "totality of the

circumstances." *Nordling, supra,* at 1469. The police, after (1) being told by the lessor that the shed had been rented by the Petitioner; (2) seeing the padlock on the shed; and (3) knowing that the Petitioner had left just a few minutes before, could not have *reasonably* believed that the Petitioner had permanently left the shed and its contents, if any. The concept of abandonment carries with it a stamp of *permanence*. If there had been no lock on the shed, if the lessor had stated that rent had not been paid, if the Petitioner had not been on the premises for weeks, days, or even hours, then the police would have had more of a reasonable basis for believing that the shed had been abandoned. The police's observation of the scene, and subsequent request for consent could not reasonably have been based upon the concept of abandonment.

The Fourth Amendment to the United States Constitution is intended to protect citizens against unreasonable searches without warrants. This warrant requirement applies to personal effects wherever they may be found and neither history nor decisional law supports limiting the warrant clause solely to the home. *Coolidge v. New Hampshire,* 403 U.S. 443, 454, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). Furthermore, the "good faith exception" to the exclusionary rule established in *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405, 82 L.Ed.2d 677 (1984) does not extend to warrantless searches not subject to a regulatory scheme. *Warner, supra,* at 404-05. Therefore, no good faith exception can be claimed by the police in the instant case.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linda G. Cryer, hereby certify that three true and correct copies of this Petition were mailed, postage prepaid, to Donald F. Searles, Assistant U.S. Attorney, 1130 "O" Street, Room 4304, Fresno, California 93721, on this 20th day of September, 1989.

LINDA G. CRYER

APPENDIX

EXHIBIT A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-1318
88-1330

D.C. No. CR-87-0081-EDP

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

KELVIN KIM WILLIAMS;
JAMES CHARLES WALLACE,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Argued and Submitted May 10, 1989
San Francisco, California

(Filed June 22, 1989)

MEMORANDUM*

Before: HUG, SCHROEDER, and CANBY, Circuit Judges.

After a joint trial, appellants James Wallace and Kelvin Kim Williams were convicted of conspiracy to manufacture

* This disposition is not appropriate for publication and may not be cited to or by the courts of ths circuit except as provided by 9th Cir. R. 36-3.

PCP, *see* 21 U.S.C. §§ 841(a)(1), 846 (1982), manufacture of PCP, *see* 21 U.S.C. § 841(a)(1) (1982), and possession of PCC with intent to manufacture PCP, *see* 21 U.S.C. § 841(a)(1) (1982). A third codefendant, Alvin Upson, was acquitted on all counts. On appeal, both Williams and Wallace raise numerous claims of error. We affirm.

A. *Motion for Severance*

Williams and Wallace first contend that the district court erred in denying their respective motions for severance.[1] Each appellant argues that severance was necessary due to antagonistic defenses and spillover evidence. Wallace claims, in addition, that the joint trial barred the presentation in his defense of the exculpatory testimony of Williams. We review the district court's denial of a severance motion for abuse of discretion. *United States v. Polizzi*, 801 F.2d 1543, 1553 (9th Cir. 1986).

1. *Antagonistic Defenses*

Ordinarily, defendants jointly indicted should be jointly tried. *See id.* at 1553. If, however, codefendants' defenses are so antagonistic as to be mutually exclusive—that is, acquittal of one defendant will preclude acquittal of the other—then severance is necessary. *See id.* at 1554; *United States v. Ramirez*, 710 F.2d 535, 546 (9th Cir. 1983). In the instant case, Wallace and Williams argue that their defenses and that of codefendant Upson were impermissibly antagonistic. This claim, however, is belied by Upson's testimony at trial. Upson testified that he

1. Because we conclude that severance was not mandated, we do not address the government's claim that Williams waived his right to contest a joint trial.

did not know what was going on in the shed, that he rented it to an individual named Charles Wilson, and that he knew Wallace because Wallace had purchased a number of his bobtail cats. Further, although Deputy Chew testified that Upson told him on the night of the arrests that the shed was rented by Wallace and Williams, Upson expressly denied making such a statement at trial. Thus, crediting Upson's story did not preclude acquittal of Wallace or Williams. Indeed, all three codefendants could have been exonerated had the jury believed that Charles Wilson was the only culpable party. Severance was therefore not required due to antagonistic defenses.

2. *Spillover Evidence*

To determine whether severance is required due to the prejudicial effect of spillover evidence, we focus on "whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in the light of its volume and limited admissibility." *Ramirez*, 710 F.2d at 546 (citations omitted). Severance is not necessary simply because the evidence is stronger against one codefendant than against another. *See United States v. Marcello*, 731 F.2d 1354, 1360 (9th Cir. 1984).

The possibility of prejudice in the present case was not strong enough to necessitate severance. Much of the evidence introduced was at least potentially relevant to all three defendants, because the jury was free to conclude that a conspiracy existed and that each co-conspirator was therefore vicariously liable for all the acts of the other co-conspirators taken in furtherance of that conspiracy. *See United States v. Basey*, 613 F.2d 198, 202 (9th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980).

Further, the district judge instructed the jury that it should determine each defendant's guilt or innocence individually, considering only the evidence applicable to that defendant. The jury apparently followed this instruction as it acquitted Upson while convicting Wallace and Williams. Finally, although three defendants were tried, the trial was not so long and complex that the likelihood of jury confusion was high. Refusing to grant severance on this ground was not an abuse of discretion.

3. *Exculpatory Testimony*

Wallace's third ground for arguing that severance was appropriate is that separate trials would have allowed him to present the exculpatory testimony of Williams in his defense. Since Williams refused to take the stand at his own trial, his testimony was not available in a joint forum. "When the reason for severance is the need for a codefendant's testimony, [a] defendant must show that he would call the codefendant at a severed trial, that the codefendant would in fact testify, and that the testimony would be favorable to the moving party." *United States v. Jenkins*, 785 F.2d 1387, 1393 (9th Cir.), *cert. denied*, 479 U.S. 855 (1986). Wallace has clearly failed to meet this heavy burden. First, Wallace never described the nature of the exculpatory testimony he intended to elicit from Williams. *See id.* at 1394 (a mere assertion that a codefendant's testimony would be favorable is insufficient). Further, Williams never unequivocally promised to testify, but instead agreed to appear at Wallace's trial only after his own case was completed. Such a conditional offer of testimony is sufficient reason, in itself, to deny Wallace's severance request. *See, e.g., United States v. Little*, 753 F.2d 1420, 1446 (9th Cir. 1984).

B. *Sufficiency of the Evidence*

Both Williams and Wallace argue that the evidence was insufficient to support their convictions for conspiracy to manufacture PCP and actual manufacture of over a kilogram of a substance containing a detectable amount of PCP. When reviewing the sufficiency of the evidence, appellate courts must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original) (citation omitted).

1. *Conspiracy to Manufacture PCP*

According to Williams and Wallace, the evidence adduced at trial proved only that they were associates, not that they were co-conspirators. In order to establish the existence of a conspiracy, the government had to prove: "(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Meyers*, 847 F.2d 1408, 1412-13 (9th Cir. 1988) (citation omitted). "A conspiracy may be proven by circumstantial evidence that the defendants acted together with a common goal." *United States v. Disla*, 805 F.2d 1340, 1348 (9th Cir. 1986). Finally, "[o]nce existence of a conspiracy has been established, evidence of only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation in it." *United States v. Berberian*, 851 F.2d 236, 238 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1567 (1989).

In the present case, a large amount of circumstantial evidence exists implicating both Wallace and Williams in a conspiracy to manufacture PCP.[2] In addition, Wallace's attempt to offer an innocent explanation of events could easily have been disbelieved by the jury as his account was often inconsistent and without corroboration. Given these circumstances, we cannot conclude that the jurors who convicted Williams and Wallace of conspiracy acted irrationally.

2. *Manufacture of Over a Kilogram of a Substance Containing a Measurable Amount of PCP*

Appellants' only objection to their conviction on this count is that the government failed to prove that any of the substances the two men manufactured that contained a measurable amount of PCP weighed over one kilogram. However, a chemist testified at trial that he detected PCP in the chemical sludge found in three buckets in the laboratory. The combined weight of these buckets was 134 pounds, substantially in excess of the one kilo-

2. This evidence includes: (1) Williams' palm prints found on two of the cans of ether seized from the shed; (2) a maroon bag allegedly shared by the two men, containing a page torn from a telephone directory listing chemical supply houses and another paper listing the address and telephone number of a chemical supply company owned by "Vincent"; (3) testimony of one of Vincent's employees that two men matching the general description of Wallace and Williams purchased a large quantity of chemicals in June of 1986 and loaded those chemicals into a U-Haul truck; (4) a U-Haul rental receipt in Williams' name indicating the rental of a truck in June of 1986; (5) a Pak 'n Save receipt found in Wallace's personal belongings for 41 cans of lye purchased the day before his arrest; (6) suitcases found in the motel room allegedly shared by Wallace and Williams containing a gas mask and several cans of epoxy; (7) suitcases of an identical make and style found in the shed on Upson's property; and (8) the presence of both men on Upson's property where a working PCP laboratory was discovered.

gram (2.2 pound) requirement. The government did not need to establish the actual amount of PCP found in this sludge as long as there was a "detectable" amount present. The evidence of weight was therefore sufficient.

C. *Codefendant's Absence from Trial*

After several prospective jurors had been selected as members of the petit jury but before the full panel had been selected and sworn, one of appellants' codefendants, Beverly Ann Hobbs, pled guilty and was thereafter absent from the trial. Appellants immediately asked the district court to dismiss the venire on the ground that it might speculate regarding Hobbs' absence, conclude that she had pled guilty, and impermissibly impute her admission of guilt to the remaining defendants. The district judge, however, refused to dismiss the venire.[3] Instead, he instructed the jury that it should not speculate regarding Hobbs' absence nor consider her absence when determining the guilt or innocence of the remaining defendants. This admonition was repeated in the district court's final instructions to the jury.

The district judge handled the situation in an entirely proper manner. The instruction it gave is functionally identical to the model instruction promulgated by this circuit to cover just such an occurrence. *See Manual of*

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3. Whether deemed a refusal to grant a mistrial or a denial of a motion to quash the venire, the district court's decision is reviewed only for abuse of discretion. *See United States v. Segal*, 852 F.2d 1152, 1155 (9th Cir. 1988) (denial of motion for mistrial reviewed for abuse of discretion); *United States v. Steel*, 759 F.2d 706, 710 (9th Cir. 1985) (motion to disqualify the venire for viewing the defendant in chains reviewed for abuse of discretion); *cf. United States v. Bourgeois*, 746 F.2d 401, 405 (8th Cir. 1984) (denial of a motion for mistrial based on statements made by a prospective juror during voir dire reviewed for abuse of discretion).

Model Jury Instructions for the Ninth Circuit § 2.11 (1985). Further, although in this case the venire was never told of Hobbs' guilty plea, this circuit has refused to find reversible error even in more extreme cases where such information was disclosed. *See United States v. Washabaugh*, 422 F.2d 1127, 1129 (9th Cir. 1971) (where defendants are closely identified with one another better practice is not to disclose guilty plea, but not reversible error to do so); *Jones*, 425 F.2d 1048, 1053 (9th Cir.) ("plain and nonargumentative statement [disclosing guilty plea] is proper"), *cert. denied*, 400 U.S. 823 (1970).

D. *Right to Speedy Trial*

Williams claims that the 9-month delay between his arrest and the commencement of his trial constitutes a violation of his sixth amendment right to a speedy trial. When reviewing a speedy trial claim, "[t]he district court's findings of historical fact concerning the reasons for the . . . delay are reviewed under the clearly erroneous standard." *United States v. Layton*, 855 F.2d 1388, 1411 (9th Cir. 1988) (citation omitted), *cert. denied*, 109 S. Ct. 1178 (1989). In contrast, the district court's application of law to the facts is reviewed *de novo*. *Id.* The Supreme Court has adopted a functional test for analyzing speedy trial questions that involves the weighing of four primary factors: (1) the length of the delay; (2) the reasons for it; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to the defendant caused by the delay. *See United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir. 1985) (citing *Barker v. Wingo*, 407 U.S. 514, 522 (1972)). No single factor is sufficient to establish a violation. *Id.* (citation omitted).

The 9-month delay in the present case "is not long enough to weigh heavily against the government." *United States v. Moore*, 653 F.2d 384, 388-89 (9th Cir.) (10½-month delay), *cert. denied*, 454 U.S. 1102 (1981). Further, the majority of the delay is not attributable to the government, but was instead caused by transfer of the case and the filing of defense motions. In Williams' favor, he did demand at one point to proceed to trial immediately, invoking his speedy trial rights. Further, Williams can claim prejudice due to his incarceration during the delay and the disruption of his life caused by unresolved criminal charges. *See, e.g., Solomon*, 753 F.2d at 1527. He cannot, however, successfully argue that he was prejudiced for purposes of speedy trial analysis by the rejoinder of Wallace. *See id.* (holding that the joinder of a codefendant was not "related to the passage of time" and did not impair the original defendant's right to a fair trial). Finally, Williams has pointed to no evidence that the delay hampered his ability to put on a defense.

Although Williams may have suffered some personal prejudice, the delay in this case was neither inordinately long nor due to government malfeasance. We find no violation of Williams' sixth amendment rights.

E. *Search of the Shed*

Wallace contends that the district court erred in failing to suppress evidence gleaned from the search of the shed that housed the PCP laboratory. The district court concluded that Wallace lacked standing to challenge the search because he forfeited any expectation of privacy he had in the property when he abandoned it. *See United States v. Anderson*, 663 F.2d 934, 938 (9th Cir. 1981) ("[i]f a person has voluntarily abandoned property, he

has no standing to complain of its search or seizure" (citations omitted)). A district court's determination that property has been abandoned is a factual finding subject to reversal only for clear error. *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986).

When determining whether particular property has been abandoned, courts consider "the totality of circumstances, and two important factors are denial of ownership and physical relinquishment of the property." *Id.* In the instant case, the district judge concluded that Wallace abandoned the shed when he fled the premises at high speed upon the approach of the police. *See* Section F1, *infra* (discussing evidence of flight in detail). This view of the facts was further supported by Wallace's subsequent disclaimer of any ownership interest in the premises. In these circumstances, we decline to hold the district court's finding of abandonment clearly erroneous. Thus, Wallace's fourth amendment rights were not implicated in the search of the shed.

F. *Jury Instructions*

Wallace alleges error in two separate jury instructions given by the district court in the present case. This court reviews jury instructions for abuse of discretion. *See Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). If a challenged instruction was not objected to at trial, however, review on appeal is only for plain error. *United States v. Ramos*, 861 F.2d 228, 230 (9th Cir. 1988).

1. *Flight Instruction*

Among the district court's final instructions to the jury was an instruction on flight, given over Wallace's objec-

tion. Although "[e]vidence of flight is generally admissible as evidence of consciousness of guilt and of guilt itself," *United States v. Harris*, 792 F.2d 866, 869 (9th Cir. 1986), such a flight instruction is appropriate "only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." *United States v. Silverman*, 861 F.2d 571, 581 (9th Cir. 1988) (citation omitted). Specifically, this circuit has held that four separate inferences must be justified: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness to guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Id.* at 581 (quoting *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)).

In the instant case, Wallace argues that there was insufficient evidence to support the first inference—that his conduct was consistent with flight. He claims that the only evidence before the jury on the issue was his denial of knowledge that the police were present. However, although no direct evidence that Williams and Wallace fled in response to the presence of the police was introduced, circumstantial evidence existed from which intent to flee could be inferred. Moments after the police parked their marked patrol cars at a neighboring house and proceeded toward the Arapaho Way property, Williams and Wallace left the scene at high speed. Testimony indicated that they were traveling as fast as 50 miles per hour while still in the dirt driveway leading up to the property. Indeed, appellants were unable safely to sustain this speed, overturning their vehicle in a ditch less than a mile from the laboratory.

Although Wallace testified that his erratic driving was due to the involuntary ingestion of a drug, the jury need not have believed his story. Further, the government did not need to prove flight beyond a reasonable doubt before the jury could consider it. *See United States v. Hernandez-Miranda*, 601 F.2d 1104, 1107 (9th Cir. 1979); *see also Myers*, 550 F.2d at 1050 (flight instruction proper if evidence is sufficient to furnish "reasonable support" for all four of the necessary inferences). Finally, the jury was not instructed that flight had been definitively established. Rather, it was simply told that it could consider flight, *if proven*, to whatever extent it wished. Under these circumstances, the evidence presented was sufficient to justify the instruction that was given.

2. *Specific Intent*

In its instructions to the jury, the district court stated that proof of specific intent was necessary before the defendants could be convicted. After the court defined the term for the jury's benefit, it discussed separately the elements of each crime charged. Wallace does not challenge the wording of the specific intent instruction. Rather, he argues that use of a general instruction was improper and that the district court instead should have instructed the jury separately as to each element of each offense that required specific intent. Since Wallace did not make this objection at trial, review is only for plain error. *See Ramos*, 861 F.2d at 230.

We have reviewed the district court's instructions and do not find them misleading. The specific intent instruction clearly applied to the knowledge requirement of each offense. When a different type of knowledge was required,

the district judge explained the difference to the jury. We see no plain error here.

G. *Destruction of Evidence*

During trial, a hand-drawn map of the Arapaho Way property and its environs was developed and referred to by several witnesses. Although introduced into evidence, the map was inadvertently lost and was therefore not available for counsel's use during summation or for the jury's use during deliberations. Wallace moved for mistrial and new trial based on the destruction of the exhibit, but the district court denied both motions. This decision is reviewed for abuse of discretion. *See Segal*, 852 F.2d at 1155 (mistrial); *United States v. Aguon*, 851 F.2d 1158, 1170 (9th Cir. 1988) (new trial) (en banc).

Wallace has not shown that he was substantially prejudiced by the exhibit's absence. Although the map might have been useful to the jury as a convenient summary of the testimony it heard, the jury was aware of that testimony and did have the benefit of the map prior to deliberation. *Compare, United States v. Scott*, 789 F.2d 795, 799-800 (9th Cir. 1986) (temporary loss of photographs so that defendant could not use them in his testimony not prejudicial error where contents of pictures had been testified to and jury actually had a chance to see them). The district court therefore did not abuse its discretion by concluding that the loss of the exhibit mandated neither mistrial nor new trial.

AFFIRMED.

(2)

Supreme Court, U.S.
FILED
DEC 15 1989
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CLERK

No. 89-503

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES CHARLES WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether petitioner had a legitimate expectation of privacy in a shed containing a drug manufacturing laboratory.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-13a, is unreported, but the judgment is noted at 878 F.2d 388 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1989. On August 14, 1989, Justice O'Connor extended the time for filing a petition for a writ of certiorari to September 20, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of conspiring to manufacture PCP, in violation of 21 U.S.C. 846; manufacturing PCP, in violation of 21 U.S.C. 841(a)(1); and possessing PCC with the intent to manufacture PCP, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to concurrent terms of ten years' imprisonment on the substantive counts, to be followed by five years' probation on the conspiracy count.

1. On the evening of July 19, 1987, two police officers responded to a complaint of a suspicious odor in a rural area in the foothills of the Sierra Nevada Mountains. Each officer drove his marked patrol car to the area. Upon leaving their cars, the officers smelled a strong chemical odor emanating from a shed at 11340 Arapaho Way, which was approximately 100 yards away. 4/18/88 Tr. 14, 15. One of the officers walked toward the shed. As he approached, several people left the shed and entered a nearby automobile. 4/18/88 Tr. 16. The automobile then left the property at a high rate of speed. Gov't C.A. Br. 4.

The two officers returned to their patrol cars and pursued the fleeing automobile. They found it half a mile away, upside down and off the road. Next to the overturned automobile were petitioner, co-defendant Kelvin Williams, and a neighbor who had stopped to assist them. Petitioner and Williams were placed under arrest for evading a peace officer. 4/18/88 Tr. 17. Petitioner stated that he had been driving the wrecked automobile and that he was driving fast because he had been "drinking, smoking reefer and using ether." Because the clothing of petitioner and Williams smelled strongly of ether, the two officers placed them in one of the patrol cars and drove them back to 11340 Arapaho Way. Gov't C.A. Br. 4-5.

When the officers returned to 11340 Arapaho Way, they were met by co-defendant Alvin Upson. One of the officers informed Upson that a strong chemical odor was coming from the shed. Concerned that a volatile drug laboratory might be located inside the shed, the officer requested permission to search it. 4/18/88 Tr. 19. Upson stated that although he had rented the shed to petitioner and Williams (both of whom remained in the rear of the patrol car), Upson had a key to the padlock on the shed. Upson consented to the search and unlocked the shed for the officers. Gov't C.A. Br. 5.

Inside the shed, one of the officers found numerous white plastic buckets in which some kind of chemical reaction was taking place. He also observed a large container marked "sodium cyanide," containers of metal shavings, and a pair of gas masks. More concerned than ever about the possibility of a fire or chemical explosion, the officer asked petitioner and Williams whether there was any danger presented by the chemical reactions taking place in the shed. Both petitioner and Williams disavowed any knowledge of the contents of the shed. 4/18/88 Tr. 20-21; Gov't C.A. Br. 6.

The officer requested additional assistance, and another officer soon arrived. After inspecting the shed for possible fire hazards, he contacted a California Department of Justice chemist to obtain his opinion about whether the chemicals in the shed were likely to explode. Upon being advised that the chemical reactions taking place in the buckets presented little danger of fire or explosion, the officers guarded the shed until a search warrant could be obtained. Gov't C.A. Br. 6-7.

The following day, police officers executed a search warrant for the shed and surrounding area. In the shed, the officers found a fully operational PCP laboratory with equipment and chemicals capable of producing more than 60 pounds of PCP. Among those chemicals was 55 pounds

of PCC, which a chemist identified as the immediate precursor of PCP and which has no use other than to produce PCP. Gov't C.A. Br. 7.

After his arrest, petitioner gave a statement to the police. Petitioner claimed that he and Williams went to Upson's property to go to a party and that he had never been to the property before. Petitioner explained that shortly after he arrived on the property he had met a seven-foot tall black man who gave him some "reefer" to smoke that made him ill. Gov't C.A. Br. 10.[1]

2. The district court denied petitioner's motion to suppress the evidence that was seized from the shed. First, the court concluded that petitioner had "not shown that he had a reasonable expectation of privacy" in the shed because petitioner had represented, in his motion for severance, that he lacked any possessory or other interest in the shed. *United States* v. *Wallace*, No. CR-F-87-81 REC (E.D. Cal. Apr. 19, 1988), slip op. 5. Second, the court determined that petitioner had abandoned any expectation of privacy he may once have had in the shed when he fled from that structure as the officers approached and when he denied any relationship to the shed upon being asked about its contents. *Id.* at 7. The court found that petitioner had abandoned

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[1] Petitioner denied seeing the officers before he drove away from the property.

Petitioner gave a different account when he testified at trial. At that time, petitioner said that he was present at 11340 Arapaho Way on the night of his arrest for the purpose of purchasing a "bobtail" cat from Upson. He testified that he arrived at Upson's residence shortly before dark and met an unknown man who insisted that he smoke a cigarette. Petitioner admitted that he did not smoke. But he smoked the cigarette anyway and became very ill. Petitioner said that the side-effects of an unknown drug in the cigarette caused him to wreck his car. Gov't C.A. Br. 10-11.

any interest in the shed "even though [petitioner's] disclaimer was made after the shed was searched without a warrant." *Id.* at 7-8.[2]

3. The court of appeals affirmed on the basis of the district court's factual finding that petitioner had "forfeited any expectation of privacy he had in the property when he abandoned it." Pet. App. 9a-10a. In determining whether particular property has been abandoned, the court of appeals observed that courts consider "the totality of [the] circumstances, and two important factors are denial of ownership and physical relinquishment of the property." Pet. App. 10a. In this case, the court of appeals adopted the district court's findings that petitioner "fled the premises at high speed upon the approach of the police" and that petitioner "subsequent[ly] disclaime[d] * * * any ownership interest in the premises"—findings that the court of appeals held were not clearly erroneous. *Ibid.* On the basis of those findings, the court of appeals held that petitioner's "fourth amendment rights were not implicated in the search of the shed." *Ibid.*[3]

ARGUMENT

Petitioner renews his contention that he had a legitimate expectation of privacy in the shed at 11340 Arapaho Way. Pet. 5-9.

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[2] Because it found that petitioner had no legitimate expectation of privacy in the shed, the district court did not consider the reasons the government gave for concluding that the police officers' warrantless search was reasonable under the Fourth Amendment. *United States* v. *Wallace*, slip op. 8 n.1.

[3] Because it found that petitioner had abandoned any privacy interest in the shed, the court of appeals, like the district court, had no occasion to consider the government's argument that the warrantless search of the shed was lawful.

1. To claim the protection of the Fourth Amendment, a defendant bears the burden of establishing that he had a "legitimate expectation of privacy" in the invaded place. See, *e.g.*, *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1, 143 (1978). To do so, the defendant must show that he had a subjective expectation of privacy in the premises that society recognizes as reasonable. *Rakas*, 439 U.S. at 143-144 n.12; *Katz* v. *United States*, 389 U.S. 347, 353 (1967); *id.* at 361 (Harlan, J., concurring). The requirement that a defendant have a legitimate expectation of privacy follows from the principle that Fourth Amendment rights are personal in nature: "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of *his* Fourth Amendment rights infringed." *Rakas*, 439 U.S. at 134 (emphasis added). See *United States* v. *Salvucci*, 448 U.S. 83, 86-87 (1980); *United States* v. *Payner*, 447 U.S. 727, 733 (1980).

Petitioner failed to meet his burden of proving that he had a legitimate expectation of privacy in the shed at 11340 Arapaho Way at the time the officers entered it. Petitioner did not testify at the suppression hearing and claim that he was renting or otherwise had any interest in the shed. Gov't C.A. Br. 16 n.3. To the contrary, petitioner affirmatively disavowed any interest in the shed in his motion for a severance. Gov't C.A. Br. 13. Moreover, both in his statement to the police after his arrest and in his testimony at trial, petitioner claimed he was present at the shed only as a visitor on the evening that he was arrested and that he had no other connection to the shed.

Petitioner's claim of standing therefore stands or falls on Upson's statement to the police officers that petitioner and

Williams had rented the shed from Upson.[4] In light of petitioner's subsequent denials of any interest in the shed, and evidence showing that the shed was on Upson's property and that Upson was apparently the only person present who had a key to the padlock on the shed, the district court was correct to conclude that petitioner failed to demonstrate a legitimate expectation of privacy in the shed. That finding is not clearly erroneous and does not merit review by this Court.

2. Even if petitioner had a legitimate expectation of privacy in the shed at 11340 Arapaho Way, the police officers' warrantless search of the shed was justified by exigent circumstances and consent.[5]

As they approached the shed, the officers smelled "extremely strong" chemical odors: "They were to the point where it was hard to walk around without feeling like you were getting congested with the odors." 4/18/88 Tr. 18. Petitioner's flight from the shed, his admitted drug use, and the strong smell of ether on his person provided the officers with probable cause to believe that potentially volatile chemical reactions were taking place inside the shed. 4/18/88 Tr. 19, 22.

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[4] At trial, Upson denied ever telling the officers that he had rented the shed to petitioner and Williams and instead testified that he had rented the shed to a man named Wilson. Gov't C.A. Br. 11.

[5] As the prevailing party in both courts below, the government may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). The government argued in both the district court and the court of appeals that the police officers' warrantless search of the shed was justified by exigent circumstances and consent. Gov't D. Ct. Br. 10-16; Gov't C.A. Br. 17-18 n.4. Accordingly, the government is entitled to defend the judgment on those grounds.

Those particularized exigent circumstances dictated that the officers search the shed and determine whether a danger of fire or explosion existed. The officers' initial search was carefully limited to that objective; a full search of the shed took place only after the police had obtained a valid search warrant the following day. The officers' bona fide concern for their safety and that of the others present was demonstrated by the officers' inquiry of petitioner and Williams whether the chemical reactions taking place presented a fire hazard.

Moreover, the officers had valid consent to enter the shed from Upson, who had authority over the premises. Even according to Upson's own account, he at least shared control over the shed with petitioner. The evidence showed that Upson and his girlfriend occupied the mobile home located at 11340 Arapaho Way and entered the shed two to four times a month to take garbage out of it. Gov't D. Ct. Br. 12 & n.2.[6]

Even if Upson lacked actual authority over the shed, the police officers on the scene were justified in relying on his apparent authority to consent to the search. The facts that Upson lived on the property and possessed a key to the shed justified the officers' good faith reliance on Upson's claim that he was authorized to enter the shed and thus could validly consent to the search.[7]

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[6] Petitioner now asserts that the relationship between petitioner and Upson was that of a tenant to his landlord, see Pet. 5-6, but that characterization does not accurately reflect the evidence adduced in the district court.

[7] The issue whether the police officers could rely on Upson's apparent authority to consent to a search of the shed is similar to the first question presented in *Illinois* v. *Rodriguez*, cert. granted, No. 88-2018 (Oct. 30, 1989). We believe that the judgment in this case is correct even if the police officers could not have relied on Upson's apparent authority

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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to consent to the search of the shed, and we therefore urge that the petition in this case be denied rather than held pending the decision in No. 88-2018.

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